Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of Sponsorship Identification Rules and Embedded Advertising	)))))))	MB Docket No. 08-90 FCC 08-155

REPLY COMMENTS OF SCREEN ACTORS GUILD

Pursuant to the Commission's Notice of Inquiry and Notice of Proposed Rule Making ("Notice") adopted June 13, 2008 and released June 26, 2008,[1] Screen Actors Guild ("SAG" or "the Guild") hereby respectfully submits these reply comments in the above-captioned proceeding regarding the Commission's sponsorship identification rules and the increasing industry reliance on embedded advertising techniques.

I. BACKGROUND.

In its comments, Screen Actors Guild demonstrated that the use of product placement and product integration (whereby a product is woven into a story line of a television program) has increased exponentially in recent years. This burgeoning trend of stealth advertising flourishes by blurring the traditional lines between programming and advertising in a manner not envisioned when this Commission last updated its sponsorship identification rules. Accordingly, SAG urges the Commission to revise its sponsorship identification rules in response to this new television advertising paradigm by establishing unambiguous safeguards for consumers. Specifically, SAG proposes that the Commission require clear and distinct visual and audio disclosure before and after a program which contains product placement and integrated products,

[1] 73 FR 43194-02, Notice of Inquiry and Notice of Proposed Rulemaking, MB Docket No. 08-90; FCC 08-155, "Sponsorship Identification Rules and Embedded Advertising," July 24, 2008.

among other safeguards.[2] Increased disclosure is critical to preserving the integrity of television programming by ensuring that the American viewing public knows who is trying to persuade them as they watch a particular program.

The Commission received over one hundred sixty comments to its Notice of Inquiry and Notice of Proposed Rulemaking, including filings from concerned parents, media watchdog organizations, television writers and producers, labor guilds, children's advocacy organizations, and concerned citizens and television viewers. In the wake of the recent unprecedented explosion of product placement and integration in television programming in recent years, only seven of these commenters resisted proposed changes to the Commission's sponsorship identification rules that would increase disclosure obligations.[3] With a lone exception, every comment in opposition to increased disclosure was filed by an entity or association which profits directly (or whose members or sponsors profit directly) from the current epidemic of surreptitious product placement and integration.

II. THE USE OF PRODUCT INTEGRATION IS INCREASINGLY WIDESPREAD AND SOPHISTICATED.

The vast majority of comments (over one hundred thirty, or over eighty percent of all the comments filed) came from individual Americans—viewers, parents, alarmed television writers—upset about the growing and evolving trend of stealth television advertising. The comments of Korby Siamis are illustrative of the level of concern across all of these demographics. In addition to being a longtime television writer and producer of television shows such as *The Cosby Show* and *Murphy Brown*, Ms. Siamis is a mother grappling with "the use of product placement... a more insidious force that challenges my parenting."[4] Speaking in her role as a writer/producer, Ms. Siamis notes that:

> (t)he concept that we would ever have been expected to include product names or usage in our writing would have been beyond ludicrous, and would have been strongly fought as the worst kind of assault on our creative process. There is no

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[2] Additionally, SAG maintains that the disclosure should appear in readable text for a distinct amount of time. The announcements should contain specific language explaining that the program contains imbedded content that has been included in exchange for remuneration or other consideration and its inclusion is a paid advertisement.

[3] See generally, Comments of National Association of Broadcasters, National Cable & Telecommunications Association, Starz Entertainment, LLC and Ovation, LLC, GroupM Worldwide, Inc., and the Product and Freedom Foundation.

[4] Comments of Korby Siamis at 1.

quicker way to strip writers of their integrity than to make them answer to the dollar.[5]

Unchecked and undisclosed product integration threatens to undermine the creative and editorial integrity of televised programming. Indeed, as the Comments of integrated marketing consultant and educator N.E. Marsden point out, "(p)roduct placement and product integration deals, taken individually, may seem innocuous. But in the aggregate, they add up to a serious degradation of telecommunications content, and substantial risk for consumers and society."[6]

A. Stealth Advertising, and Product Integration in Particular, is Exploding.

In its comments, SAG sets forth the empirical basis for its proposed rule change—the unprecedented proliferation and sophistication of product integration on televised programming. As several commenters note, the extent and effects of product integration on viewers are widespread. The comments of the Writers Guild of America, West, detail the dramatic growth of the practice, noting that there were 5,190 integrations on network television in 2007, a 13% increase from the previous year, in addition to 85,846 product placements.[7] In dollar terms, the Writers Guild quotes a PQ Media study that shows advertising spending on product placement and integration increased 33.7% from 2006 to 2007 to a total of $2.9 billion.[8] From a screen time perspective, brand appearances averaged 12 minutes, 8 seconds per hour (17 minutes, 19 seconds for unscripted programming) on primetime network television, an increase of 91% from the first quarter 2007 to first quarter 2008.[9]

Nonetheless, the National Association of Broadcasters ("NAB") maintains in its comments that "(t)here exists little to no evidence that suggests the current rules are insufficient to inform an American public that is savvier to the pressures of commercial influence today..."[10] The NAB points out that "(p)roponents of regulation cannot merely assume, without evidence, that the existing sponsorship identification rules are ineffective."[11] However, the ineffectiveness of the Commission's vestigial rules is no mere "assumption." The current rules are facially

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[5] *Id.*
[6] Comments of N.E. Marsden, Educator and Integrated Marketing Consultant at 2.
[7] Comments of the Writers Guild West at 7.
[8] *Id.*
[9] *Id.* at 8.
[10] Comments of National Association of Broadcasters ("NAB") at 2.
[11] *Id.*

ineffective, not only due to the exponential growth of product placement and integration, but also by virtue of the routine flouting of existing rules through the use of credits which scroll by at high speeds in small fonts designed to prevent viewer comprehension and skirt the spirit, if not the letter, of the existing rules.

As the Center for Science in the Public Interest notes in its comments, "under current FCC sponsorship identifications rules, most product placement disclosures are barely visible to the average viewer, if they are seen at all. Fine-print disclosures that pass by quickly during the closing credits do not adequately inform consumers when they are being subjected to an advertisement and that the product they see onscreen has been placed there in return for compensation."[12]

The Writers Guild comments highlight several specific instances that demonstrate the inadequacy of existing Commission disclosure rules, as implemented by broadcasters. One example consisted of a thirty-seven word disclosure that appeared for less than one second and contained the name of the parent corporation's holding company rather than the name of the product advertised in the episode.[13] Such disclosure problems are often compounded by the increased use of split-screen credits, which further decrease the size of disclosure to viewers. After citing numerous egregious examples of stealth advertising, Commercial Alert summarizes the current state of television disclosure as follows: "(t)he hidden advertisement disclosures at the end of programs appear in unreadable, fast-moving type, and convey information about product placements in coded language. In other words, for the average viewer, there is no effective disclosure of hidden advertisements."[14]

B. The Evolution and Increasingly Coercive Nature of Product Integration Impacts Creators as well as Viewers.

As the comments of N.E. Marsden demonstrate, product placement and integration have become not only more frequent, but more subtle and devious. Marsden cites promotional materials from numerous marketers that "admit they traffic in deception," boasting about the virtues of product integration because "often consumers do not even realize they are being

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[12] Comments of the Center for Science in the Public Interest at 2.
[13] See generally, WGA, West Comments at 10-13.
[14] Commercial Alert at 10.

marketed to."[15] Marsden warns that these practices are leading inexorably down "a slippery slope to advertainment" as embedded advertising "is devolving to more potent forms."[16]

As *New York* magazine recently noted, "effective integrations combine several elements… characters should praise the brand's features—and then an ad should appear at the commercial break, cementing the association."[17] Product integration is an evolving practice, the success of which is based on the subtle manipulation of the viewing audience. According to the *New York* magazine article, "For the viewer, there's no way to discern what's a prop, what's a paid integration, and what's just a writer freely referencing a brand, but that's the point."[18] The article points to several instances of product integration on shows like the NBC comedy *30 Rock* and others that are so subtle that not even veteran television writers and producers realized that integrations had even taken place.

In addition to affecting viewers, the unchecked spread of product integration impacts actors as well. As SAG discussed in its comments, it is becoming as difficult for actors to confront instances of product integration as it is for viewers to detect them. Spotlighting this problem, the recent *New York* magazine article noted that, "at some point, some of the cast members started saying, 'Are we doing a commercial or are we filming *30 Rock*?'" Actors often have little to no latitude to resist participating in an instance of product integration, almost always without compensation.

This practice of forced endorsements is underscored in Marsden's Comments, which quote marketing materials from marketer Vista Group boasting, "products used in motion pictures or television are perceived by the audience to be chosen by the star, thus receiving an implied endorsement."[19] *New York* magazine underscored the predicament of Keith Powell, one of the actors on the NBC comedy *30 Rock*. "But Powell, who has done successful commercials, knows they generally pay a noncompete clause, to insure actors can't pitch a competing product. The cast members discussed the lack of compensation, but nobody seems to have complained."[20] This dilemma is crystallized by another actor on the show, Judah Friedlander, who observes

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[15] Comments of Marsden at 7-9.
[16] *Id.* at 13, 16.
[17] "What Tina Fey Would Do for a SoyJoy," *New York* magazine (Oct. 5, 2008).
[18] *Id.*
[19] Marsden Comments at 9.
[20] "What Tina Fey Would Do for a SoyJoy," New York Magazine (Oct. 5, 2008). A copy of this article may be viewed on line at http://nymagazine.com/news/features/5101 ("NY Mag").

that "(s)ometimes there's an integration going on and I don't even know it. Maybe if you're a huge star, you can say no. Where I'm at, you pretty much do it if they tell you."[21]

III. THE EVOLUTION AND EXPANSION OF PRODUCT INTEGRATION NECESSITATES MORE STRINGENT SPONSORSHIP IDENTIFICATION RULES.

The staggering growth of stealth advertising—coupled with the industry's current oblique disclosure practices—underscores the inability of the Commission's rules to respond to this epidemic. As the practice becomes increasingly sophisticated, the Commission's disclosure rules must keep pace since, as Chairman Martin noted in his statement, "it is important for consumers to know when someone is trying to sell them something."[22] After all, the FCC's duty is to act in the best interest of the viewing public, not those of the advertisers.

At a minimum, the Commission's disclosure rules need to be revised to address such practices by broadcasters and advertisers. Section 317(a) of the Communications Act of 1934 requires a broadcaster to disclose any payment sponsoring a program at the time of the program's broadcast.[23] As SAG discussed in the comment round and Commercial Alert notes in its comments, "the current disclosure regime fails to satisfy Section 317, or protect viewers from hidden advertisements."[24] Quite simply, if consumers cannot recognize a sponsorship disclosure, it is not "disclosed."

Contrary to the assertions of the NAB and other parties opposing expanded consumer notification of stealth advertising, the Commission's rules no longer "strike the proper balance between the public's right to know when programming is sponsored and its desire to have access to free, advertiser supported broadcasting service,"[25] and therefore, must be updated. The current rules do not provide adequate information or consumer protection. As the advertising techniques have become more pervasive and insidious, the rules must likewise evolve.

Accordingly, SAG has proposed a narrowly tailored refinement of the sponsorship identification rules which strikes a practical balance between adequately informing consumers and sustaining a workable revenue model for television programming. The Guild is not calling for a ban on product integration; it is merely urging a level of disclosure that is commensurate

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[21] *Id.*
[22] Statement of Chairman Kevin Martin in response to FCC's Notice of Inquiry and Notice of Proposed Rulemaking.
[23] 47 U.S.C. §317(a).
[24] Commercial Alert Comments at 8.
[25] NAB Comments at 1.

with, and responsive to, the increased level of stealth advertising on television. Such a modification to the existing rules in no way limits commercial speech; it simply alerts consumers to the existence of any commercial relationship underlying the speech, with minimal imposition on broadcasters and advertisers. SAG's proposal is far from NAB's categorical characterization of any proposed change to the sponsorship identification rules as "radical"[26] and "burdensome regulation."[27]

Ignoring the explosive growth of the past few years, NAB asserts that, despite dating from 1963 without update since 1992,[28] "the sponsorship identification rules that remain the law today were designed with both product placement and product integration in mind." In support of this contention and its argument that the Commission's existing rules are sufficient to address the unprecedented sophistication of product integration, the NAB notes an example from the Commission's 1963 Public Notice which states that if "a refrigerator is furnished by X" and "during the course of the program the actress says: 'Donald go get the meat from my new X refrigerator.' An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program."[29]

However, the current rules, as implemented by broadcasters, do not meet this standard. An announcement that is rendered meaningless because it is imperceptible to the viewing audience does not meet the spirit or letter of the Commission's 1963 rules. Unless the NAB is correct (in which event, the NAB is suggesting that the FCC should be bringing enforcement actions), the rules must be amended to ensure a real and meaningful disclosure of sponsorships at the beginning and end of each program. As observed by San Francisco Department of Public Health, "[c]hanging circumstances have not altered a principle long-recognized and protected by the FCC: people need to know when, and by whom, they are being advertised to."[30]

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[26] NAB Comments at 8.
[27] *Id.* at 25.
[28] Applicability of Sponsorship Identification Rules, 28 Fed. Reg. 4732 (May 6, 1963). See also, Amendment of Commission's "Sponsorship Identification" rules, 52 FCC Rcd. 701, ¶ 2 (1975). Codification of the Commission's Political Programming Policies, 7 FCC Rcd. 1616 (1992).
[29] NAB Comments at 5, referencing In re: Applicability of Sponsorship Identification Rules, Public Notice, 40 FCC 141, 146-149 (1963).
[30] Comments of the City and County of San Francisco Department of Public Health at 1.

IV. STRENGTHENED DISCLOSURE RULES WOULD CONSTITUTE MINIMUM IMPOSITION ON BROADCASTERS AND ADVERTISERS.

NAB maintains that there exists no significant government interest in strengthening the Commission's disclosure rules. SAG submits that preserving the integrity of televised programming and adequately informing viewers of sponsorship arrangements in compliance with the statutory mandates of Section 317 of the Telecommunications Act constitutes a significant government interest. When the Commission's rules no longer uphold this statutory obligation due to evolving advertising practices, the Commission must modify its rules accordingly. As Chairman Martin's statement in support of the Commission's Notice notes, the goal of the Commission's sponsorship identification rules, is to "ensure the public is able to identify both the commercial nature of any programming as well as its source."[31]

In its comments, NAB makes the unsubstantiated claim that any new disclosure requirements would impose an undue financial burden on broadcasters and limit the flexibility of broadcasters "to experiment with new types of advertising." The financial burden of updated disclosure on broadcasters would be *de minimus*. Moreover, more stringent rules would in no way limit the ability of broadcasters and advertisers to develop new revenue streams; such rules would merely require disclosure of such arrangements to the viewing public.

The NAB also paints an ominous scenario whereby any change to the Commission's sponsorship identification rules would result in the potential collapse of the free broadcast model. The NAB claims that "if advertising revenue slips, even by a small percentage, the free broadcasting model may be in jeopardy, particularly in today's highly competitive media marketplace."[32] However, the NAB offers no factual correlation between, or corroboration of, consumer protections such as increased disclosure requirements and decreased advertising revenues.

The NAB proclaims that local programming would disappear "if... broadcasters are precluded from experimenting with new advertising techniques."[33] Nothing in SAG's proposal would preclude broadcasters or advertisers from exploring creative advertising schemes; to the contrary, it would simply require a straightforward and basic disclosure of any advertising arrangement. Contrary to NAB's apocalyptic scenario portending the end of free broadcast

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[31] Statement of Chairman Kevin Martin in response to Notice.
[32] NAB Comments at 19.
[33] *Id.*

television or broadcast localism, adequate disclosure would result in little more than more fully informed viewers, with no attendant diminution in the abilities of broadcasters and advertisers to strike "creative" agreements. Adequate disclosure would simply provide a degree of clarity commensurate with the level of "new" and "experimental" product integration methods.

The NAB and other commenters place great emphasis on a letter from the FTC's Director of Associate Director for Advertising Practices finding that FTC action was unnecessary because product placement is not inherently deceptive. Whether product placement is inherently deceptive is irrelevant. The FTC's jurisdiction under Section 5(a) of the Federal Trade Commission Act[34] is to address deceptive acts, while the FCC's jurisdiction under Section 317 is to ensure proper disclosure of advertising. The FCC's sponsorship ID rules, as distinguished from a deceptive advertising ruling by the FTC, should serve in a prophylactic fashion to provide the first line of defense for increasingly subtle and frequently stealth advertising techniques.

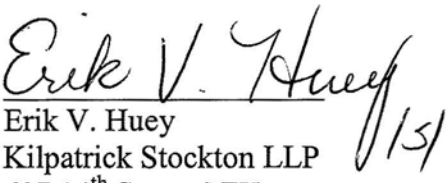
Lastly, contrary to the claims of NAB, more stringent rules would not constitute an encroachment on constitutionally protected commercial speech—otherwise *any* disclosure requirement, including the existing rules, would be violative. Indeed, revised disclosure requirements merely bring the Commission's regulations up to date at a time of unprecedented increase and sophistication of product placement and integrated television advertising.

V. CONCLUSION.

For the reasons set forth above, in order to address the explosive growth in recent years of stealth television advertising in the form of product integration, the Commission should revise and strengthen its sponsorship identification rules to ensure that the American viewing public is adequately informed of who is paying to air advertisements on broadcast and cable television.

[34] 15 U.S.C. § 45(a)(1).

Respectfully submitted,



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